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AUG 25 1966
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Supreme Court of the United States.

OCTOBER TERM, 1966.

No. 387.

BRIAN T. MAGEE, BY HIS FATHER AND NEXT FRIEND, JOHN F. MAGEE, JR., AND JOHN F. MAGEE, JR.,
Petitioners,

v.

KATHLEEN F. LANE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

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STATUTE.

Mass. General Laws, c. 231, § 113 5

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Statement of the Case.

This is an action of tort arising out of an automobile pedestrian accident that occurred in Brookline, Norfolk County, Massachusetts, on February 23, 1959. By writ dated August 4, 1959, Brian T. Magee, a minor, sought to recover for injuries sustained by him, and his father, John F. Magee, Jr., sought to recover consequential damages. The defendant John F. Lane, Jr., was the absent owner of the automobile in question, which was operated by the defendant Kathleen F. Lane. The action was tried before an auditor in the Middlesex Superior Court in May, 1961. The auditor, finding that the minor plaintiff was not in the exercise of due care and that the defendants were not negligent, found for the defendant on each of the four

counts of the declaration. Subsequently the action was tried to a jury on the auditor's report and other evidence, and the jury returned a verdict for the minor plaintiff, Brian T. Magee, in the amount of $1,200 and for his father, John F. Magee, Jr., in the amount of $1,200, against the defendant Kathleen F. Lane. Verdicts were returned for the defendant on both counts against the defendant John F. Lane, Jr.

On December 13, 1961, the plaintiffs filed a bill of exceptions, which, after multiple hearings, was allowed as to exceptions taken to the denial of the plaintiffs' motion to discharge the order of reference to the auditor and to the denial of the plaintiffs' motion to recommit report to the auditor. The bill of exceptions was otherwise disallowed on the grounds that the exceptions alleged were not conformable to the truth and that the statement of the exceptions alleged was argumentative, gratuitous and incomplete and was not a true and fair statement of the proceedings to which the exceptions alleged referred. See memorandum and order on plaintiffs' exceptions annexed hereto and marked "Appendix A" (R1 24-26).*

Following the filing of said memorandum and order on June 19, 1962, the plaintiffs filed a petition to establish the truth of exceptions in the Massachusetts Supreme Judicial Court for the County of Suffolk, and on December 19, 1962, said petition was ordered dismissed by a single justice. No exceptions were taken by the plaintiffs to this order and the plaintiffs proceeded on their bill of exceptions as allowed by the trial justice.

The exceptions of the plaintiffs were argued in the Massachusetts Supreme Judicial Court on November 4,

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*R1 refers to record in case of Brian T. Magee, p.p.a. et al., *v.* Kathleen F. Lane et al., consisting of two volumes. R2 refers to record in case of Brian T. Magee, p.p.a. et al., petitioners.

1963, and were overruled on November 29, 1963. *Magee v. Lane,* 346 Mass. 475 (Appendix to Petition, pp. 13-16).

The plaintiffs' motion for a new trial was denied by the trial justice on February 20, 1964. On March 16, 1964, the plaintiffs filed a bill of exceptions. On March 25, 1964, the bill of exceptions was disallowed on the grounds that the exceptions were not conformable to the truth; that the plaintiffs, or their attorney, intentionally omitted to include in said bill important testimony of witnesses given at the trial on issues presented to the court and jury for determination, and intentionally omitted to include in said bill other important proceedings at the trial; that the bill did not set forth a full and fair summary of the proceedings at the trial adequate to show the whole case which was surveyed and considered by the court. See findings, rulings and order, Appendix B (R2 18-19).

On April 10, 1964, the petitioners filed a petition to establish the truth of exceptions in the Massachusetts Supreme Judicial Court for the County of Suffolk. On April 22, 1964, said petition was argued before a single justice of said court and was thereafter referred to a court-appointed commissioner. The commissioner submitted a report to the court in which he found that the plaintiffs' bill of exceptions did not conform to the truth. See report of commissioner (R2 25-35).

Following the filing of the commissioner's report on December 2, 1964, the single justice of the Massachusetts Supreme Judicial Court found, on the basis of the commissioner's report and his own examination of the transcript of the evidence, that the bill of exceptions was not conformable to the truth. The court allowed the respondent's motion to dismiss the petition to establish the truth of exceptions. Appendix C (R2 52).

The petitioners' exceptions to the rulings and orders of the single justice were overruled by the Massachusetts Supreme Judicial Court on April 28, 1966. *Brian T. Magee et al., petitioners,* 1966 Mass. Adv. Sh. 797 (see Appendix to Petition, pp. 12-13).

No consitutional or federal question was raised or decided during any phase of the proceedings up to and including the rescript opinion of the Massachusetts Supreme Judicial Court on April 28, 1966.

By letter dated June 9, 1966, and addressed to the Chief Justice of the Massachusetts Supreme Judicial Court, counsel for the petitioners requested a rehearing, and on June 14, 1966, the request was denied (see Appendix to Petition, pp. 16-28).

Argument.

The question presented in the petition (pp. 2-3) is pure fiction. It is wholly argumentative and gratuitous and posited on unwarranted and totally unsupported and unsupportable assumptions. The injuries sustained by the minor plaintiff and the compensation to be awarded therefor were questions of fact that were properly submitted to the jury. The jury had not only a right, but also a duty to assess damages on testimony that it accepted as trustworthy. The jury had a right to disbelieve and refuse to accept all or any part of the testimony of the plaintiffs and their witnesses. *Lydon* v. *Boston Elevated Railway Co.,* 309 Mass. 205, 206, 207. *O'Brien* v. *Harvard Restaurant & Liquor Co., Inc.,* 310 Mass. 491, 493. *Barr* v. *Warren,* 299 Mass. 60, 63. *Cerrato* v. *Miller,* 264 Mass. 533.

The jury assessed damages for the minor plaintiff in the amount of $1,200, and no other assessment of damages is found anywhere in the entire record except in the gratuitous and unwarranted statements of alleged value

in the petition. Such a fictitious statement of value does not fulfill the petitioners' obligation to show that a constitutional question was raised seasonably in the state court.

An examination of the record compels the conclusion that the decisions of the Massachusetts courts rested wholly on state rather than federal grounds, and the courts of the Commonwealth of Massachusetts were never called upon in any stage of the proceedings to consider or decide a federal question. The courts of the Commonwealth of Massachusetts disallowed the petitioners' bills of exceptions on the basis that they were not in conformity with the long-established statutes, rules and decisions of the Commonwealth of Massachusetts governing uniform and orderly methods of appellate procedure.

The petitioners' substitute bill of exceptions (filed April 4, 1962) (R1 24) was disallowed in part because it was not conformable to the truth as required by General Laws of Massachusetts, c. 231, § 113. Appendix A (R1 24-25).

The petitioners' bill of exceptions, filed March 16, 1964, was disallowed because it was not conformable to the truth. Appendix B (R2 18-19).

The single justice of the Massachusetts Supreme Judicial Court found that the petitioners' bill of exceptions was not conformable to the truth, and accordingly allowed the respondent's motion to dismiss the petition to establish the truth of exceptions. Appendix C (R2 52).

The petitioners' exceptions to the allowance of the respondent's motion to dismiss the petition to establish the truth of exceptions were overruled on purely state grounds. *Brian T. Magee et al., petitioners,* 1966 Mass. Adv. Sh. 797 (see Appendix to Petition, pp. 12-13).

The record establishes, beyond cavil, the fact that no federal question was ever presented or argued to or decided by the courts of the Commonwealth of Massachu-

setts. The petitioners failed to comply with the clear, concise and unambiguous requirements of the laws of the Commonwealth of Massachusetts regarding appellate procedure. The petitioners have not established the grounds necessary to give this Honorable Court jurisdiction to review the judgment of the courts of the Commonwealth of Massachusetts on a writ of certiorari. *In re Lamkin,* 355 U.S. 59. *Mellon Co.* v. *McCafferty,* 239 U.S. 134. *Durley* v. *Mayo,* 351 U.S. 277. *Stembridge* v. *Georgia,* 343 U.S. 541. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U.S. 62. *Southwestern Bell Telephone Co.* v. *Oklahoma,* 303 U.S. 206. *Lynch* v. *New York,* 293 U.S. 52.

The abortive attempt of the petitioners to raise a constitutional question for the first and only time in the letter of June 9, 1966, addressed to the Chief Justice of the Massachusetts Supreme Judicial Court, does not aid the petitioners and does not compensate for the failure to raise a constitutional question during the proceedings in the state courts. *Hanson* v. *Denckla,* 357 U.S. 235. *Radio Station WOW, Inc.,* v. *Johnson,* 326 U.S. 120. *Herndon* v. *Georgia,* 295 U.S. 441.

Conclusion.

From the foregoing it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID L. WHITNEY,
31 St. James Avenue,
Boston, Massachusetts 02116.

Of Counsel,
DANIEL A. LYNCH,
PAUL F. DEGNAN.

Appendix A.

MEMORANDUM AND ORDER ON PLAINTIFFS' EXCEPTIONS.

At the hearing on January 4, 1962 on the question of allowance of the bill of exceptions filed December 13, 1961, the difficulties with the bill were pointed out in the Defendant's Motion to Disallow Plaintiff's Bill of Exceptions and in the oral argument, and, thereupon, leave was granted plaintiffs to file within forty-five (45) days proposed amendments "as will make (the bill) a more accurate statement of the exceptions originally filed." On February 16, 1962 a paper entitled "Proposed Amendments to Plaintiff's Bill of Exceptions" was presented to the undersigned. After examination of that paper upon its presentation disclosed its insufficiency the Court forthwith denied leave to plaintiffs to file the same, but thereafter, on February 27, 1962, ordered the paper filed and, treating it as a motion, set it down for hearing on March 6, 1962 together with the question of the allowance of the bill. Again at the hearing on March 6, 1962 the deficiencies in the bill were pointed out in specific detail, and that the same were not cured by the paper presented February 16, 1962, and on that day the leave granted plaintiffs to present "such proposed amendments to the bill as will make it a more accurate statement of the exceptions originally filed" was extended to and including April 3, 1962. "Plaintiffs' Motion For Leave to File A Substitute Bill of Exceptions and Plaintiffs' Substitute Bill of Exceptions" was presented to the Court on April 3, 1962, and the Court ordered the same filed. A hearing on the allowance of that motion was held April 9, 1962. That motion has been allowed today.

Except for the exceptions alleged to the denial of the plaintiffs' motion to discharge the order of reference to

the auditor and to the denial of plaintiffs' motion to recommit the report to the auditor, the exceptions alleged in the substitute bill are not conformable to the truth. The statement of the exceptions alleged to the rulings of the Court on the admission and exclusion of evidence offered by the parties, to the alleged denial of certain requests for rulings filed by the plaintiffs, and to the denial of plaintiffs' motion for mistrial, is argumentative, gratuitous and incomplete and is not a true and fair statement of the proceedings to which the exceptions alleged refer.

The bill of exceptions filed December 13, 1961 was found to be not conformable to the truth and that the exceptions were not reduced to writing in a summary manner; and, if leave to amend had not been granted plaintiffs, would have been disallowed in its entirety after hearing on January 4, 1962.

The substitute bill of exceptions is hereby allowed as to the exceptions taken to the denial of plaintiffs' motion to discharge the order of reference to the auditor and to the denial of plaintiffs' motion to recommit report to the auditor; the substitute bill of exceptions is disallowed otherwise.

FRANK J. MURRAY
Justice of the Superior Court

June 18, 1962

Received and filed
June 19, 1962
Clerk of the Courts
Norfolk County

Appendix B.

Findings, Rulings and Order.

After hearing (1) defendants' motion to dismiss plaintiffs' bill of exceptions, and (2) arguments on the question whether the said bill of exceptions should be allowed, I find

(a) the plaintiffs' claim of exceptions to the denial of plaintiffs' motion for new trial was seasonably filed with the Clerk on February 25, 1964;

(b) that plaintiffs filed the said bill of exceptions on March 16, 1964, more than twenty days after the filing with the Clerk on February 21, 1964 the opinion, ruling, direction or judgment of the Court denying plaintiffs' motion for new trial, and within twenty days after receipt by plaintiffs from the Clerk of notice thereof on February 24, 1964;

(c) that if the said bill of exceptions was seasonably filed under General Laws (Ter. Ed.), c. 231, s. 113, and Rule 73, then it was seasonably presented to me for allowance on March 24, 1964 pursuant to General Laws (Ter. Ed.), c. 231, s. 114;

(d) that on March 11, 1964 the plaintiffs presented to me a motion to extend time for filing a bill of exceptions, which was assented to by the defendant; that the motion failed to set forth the matters required by Rule 73 and I denied the same; that on March 13, 1964 the plaintiffs again presented to me a motion to extend time for filing a bill of exceptions which failed to comply with the requirements of Rule 73, and I denied that motion.

I have assumed that plaintiffs, or their attorney, have failed, through inadvertence (especially in view of the assent given by the defendants' attorney to the first mo-

tion to extend the time for filing a bill of exceptions), to comply with the provisions of General Laws (Ter. Ed.), c. 231, s. 113, with respect to the seasonable filing of their exceptions, and I have, therefore, considered whether the said bill is properly before me on the question of allowance (see General Laws (Ter. Ed.), c. 231, s. 113, sixth sentence) as having been filed in good faith and that justice requires its allowance.

I find after examination of the exceptions, and after hearing the parties, that they are not conformable to the truth. I find that plaintiffs, or their attorney, intentionally omitted to include in said bill important testimony of witnesses given at the trial on issues presented to the Court and jury for determination, and intentionally omitted to include in said bill other important proceedings at the trial. I find that the bill does not set forth a full and fair summary of the proceedings at the trial adequate to show the whole case which was surveyed and considered by the Court after hearing arguments by the parties on the grounds set forth in plaintiffs' motion for new trial, and that the plaintiffs, or their attorney, intentionally omitted to include such matters in said bill. The allowance of the said bill would not, in my opinion, be in the interests of justice. I am not satisfied that the said bill was filed in good faith. The said bill is hereby disallowed.

FRANK J. MURRAY
Justice of the Superior Court.

March 25, 1964.

A true copy
Attest: H. T. Hetnik
Asst. Clerk

Appendix C.

FINDING AND ORDER DISMISSING PETITION.

On the basis of the commissioner's report and my own examination of the transcript of evidence in the case of Brian T. Magee, p. p. a., et al vs. Kathleen F. Lane, et al, Superior Court for Civil Business in Norfolk County No. 67720, I find that the bill of exceptions is not conformable to the truth. Accordingly, I allow the respondent's motion to dismiss the petition to establish the truth of the exceptions.

In view of the foregoing I deem it unnecessary to pass on the petitioners' requests for rulings even if I assume that they have any standing in this proceeding.

JACOB J. SPIEGEL

December 28, 1964 *Justice, Supreme Judicial Court*

Copy,
Attest:
JOHN E. POWERS.
Clerk.